"system, seem also to have been of opinion that they were without "authority to remedy the evil by a postal regulation. It is unnecessary "for us, in the present case, to consider how far their action and "their view and construction of the law are binding, if at all, upon "their successors. But even if we assume that the matter now comes "up for consideration for the first time, and that the Postmaster-Gen- "eral is now for the first time called on to make regulations to carry "the Statute into effect, we are clearly of opinion that the postal "regulation of July 17, 1901, so far as it assumes to add to the re- "quirements of the Statute in regard to second-class mail matter, is "in excess of his authority, and of no validity in law."

Congress has given to the heads of departments authority to prescribe regulations, not inconsistent with law, for the government of his department (R. S. sec. 161), and it has in many instances conferred upon them power to hear and determine certain questions arising in their departments, but such powers have always been conferred by special statutes, as, for example, by sec. 3909, R. S., the Postmaster-General is authorized to make regulations for the affidavit to be taken by the publishers of any newspaper or periodical which may be sent to regular subscribers, without prepayment of postage at the mailing-office. By sec. 3907, R. S., Congress provided for the carriage of newspapers issued less frequently than once a week, and by sec. 3932, R. S., authorized regulations for registering letters; by sec. 3936 it authorized regulations for dead letters, and by sec. 406, R. S., for disposing of uncalled-for printed matter.

Now if the Postmaster-General possessed under the law the large general powers here claimed for him, it is inexplicable that it should have been needful or proper to provide by special statute for these petty details of his department. It is manifest from the Statute itself that Congress did not confer on the Postmaster-General the power of affecting by regulations, to any extent, the classification which it had made with unusual regard to minute details, of the mailable matter. In hardly any other case has Congress gone so minutely into details as in the Act of March 3, 1879, which defines the features and characteristics of the four several classes into which mailable matter is divided, and having gone with such particularity into the details of the subject it is absurd to suppose that it has intended to leave to the Postmaster-General the discretionary power of disturbing or altering the plan so carefully prepared by establishing regulations, or reading into the Statute provisions which defeat the Statute.

Several Postmaster-Generals have strongly advised the amendment of

existing laws defining second-class matter so as to exclude publications like the "Riverside Literature Series" from the description of mailable matter of the second class, and require them to pay postage as third-class matter, and the subject has been repeatedly before Congress.

Feb. 2, 1888, the following bill was before the House of Representatives: —

A bill (H. R. 4910) to amend sec. 14 of the Act approved March 3, 1879, — "entitled 'An Act making appropriations for the service of "the Post-Office Department for the fiscal year ending June 30, 1880, "and for other purposes,'" and relating to second-class matter.

"Be it enacted by the Senate and House of Representatives of the "United States of America in Congress assembled, that the four-"teenth section of the Act approved March 3, 1879, entitled 'An Act "making appropriations for the service of the Post-Office Department "for the fiscal year ending June 30, 1880, and for other purposes,' be "and the same is hereby amended by adding to the proviso thereto "and to the end of said section the following words, to wit, — 'and "that no publications that are books or reprints of books, whether "they be issued complete or in parts, bound or unbound, or in series, "or whether sold by subscription or otherwise, should be admitted to "the mails as second-class matter.'"

In debate on this proposed amendment Mr. Cannon (the present Speaker of the House of Representatives) said: —

"Before speaking on the merits of this bill, I wish to say to the "gentleman from Georgia, that, according to my recollection, by legis-"lation advisedly had, prior to 1879, while I was a member of the "Committee on the Post-Office and Post-Roads, this class of litera-"ture was allowed to pass through the mails. The policy of that "legislation being to encourage the dissemination of sound and de-"sirable reading-matter among the masses of the people of the coun-"try at cheap rates, both as to the cost of the books themselves and "as to the postage. The question was discussed, unless my memory "greatly misleads me, and the legislation was advisedly had. Under this "legislation the best classes of literature, for instance, the Waverley "Novels, Dickens's works, and the new translation of the Bible, have "been sent by publishing houses unbound, stitched, so that they could "be sold to the people at ten cents a volume. As a consequence of "this, you may now find in the homes of our farmers and laboring "men throughout the length and breadth of the country in this cheap

"form, issued at ten cents per volume, a class of literature to which, "prior to the adoption of this policy, some people in very good cir- "cumstances could scarcely have access."

Cong. Rec. vol. 19, p. 911.

After debate the bill passed the House.

In the Senate it was referred to the Senate Committee on Post-Office and Post-Roads and never became a law.

April 24, 1894, the following amendment to the Post-Office Appropriation Bill was introduced in the House of Representatives: —

"SEC. 4. That all publications purporting to be issued periodically "and to subscribers, but which are merely books or reprints of books, "whether they be issued complete or in parts, whether they be bound "or unbound, or whether they be sold by subscription or otherwise, "when offered for transmission by mail shall be subject to postage at "the rate prescribed for third-class matter."

After debate the amendment was rejected.

Cong. Rec. vol. 26, part 5, p. 4050.

Jan. 7, 1897, the Senate received from the House of Representatives a bill, accompanying H. R. 4566, known as the "Loud Bill," to amend the postal laws relating to second-class mail matter. It was referred to the Committee on Post-Offices and Post-Roads, and an extended hearing was had.

The published report of the Committee, 54th Congress, 2d Session, Senate Report No. 1517, with the notes of the hearing, covering over two hundred printed pages, show that this very "Riverside Literature Series" was produced before the Committee and considered by it, and the objection was then made that these publications were merely books and should be carried only at third-class rates.

The Committee reported in favor of a bill amending the law by a proviso, —

"That nothing herein contained shall be so construed as to admit "to the second-class rate publications purporting to be issued period- "ically and to subscribers, but which are merely books or reprints of "books, whether they be issued complete or in parts, whether they "be bound or unbound."

The result was that Congress, having all this matter before it, being fully advised of every fact and view that had been presented to the Com-

mittee, refused to amend the Act of March 3, 1879, as recommended by the Committee.

It was never claimed that the Postmaster-General had the power, and no Postmaster-General ever undertook to add anything to the Statute, or to take anything away from it until July 17, 1901, after the defeat of the Loud Bill, when the following regulation was passed: —

"SEC. 276. Postal Laws and Regulations, Edition of 1893 is "hereby amended to read as follows: —

"SEC. 276. General Definition. Mailable matter of the second "class shall embrace all newspapers, and other periodical publications "which are issued at stated intervals, and as frequently as four times "a year, and are within the conditions named in sections 12 and 14 "(Act of March 3, 1879, sec. 10, 20 Stats. 359). The sections referred "to are 293 and 277. Second-class matter above described is of two "kinds: (1) That sent by other than publishers or news agents (sec. "299). (2) That sent by other than publishers or news agents (sec. "302). 'Periodical publications' herein referred to are held not to "include those having the characteristics of books, but only such as "consist of current news or miscellaneous literary matter, or both (not "excluding advertising), and conform to the statutory characteristics "of second-class matter.

"CH. EMORY SMITH,

"Postmaster-General."

The notice served on appellants to show cause why their publication, the "Riverside Literature Series," should not be denied second-class rates of postage under the provisions of sec. 276, Postal Laws and Regulations, did not assign or charge any violation of the statute law on the part of the appellants, but that their publications had the characteristics of books.

This postal regulation under which it was sought to exclude these publications is clearly in excess of the Statute. There is no such condition or requirement attached to mailable matter of the second class, that it shall not have the characteristics of books.

The regulation itself has been declared invalid by the Court of Appeals.

Payne *vs.* Nat. Rwy. Pub. Co., 20 App. D. C. 581.

IT IS NOT SOUGHT BY THIS BILL TO CONTROL THE JUDGMENT OF THE POSTMASTER-GENERAL IN ANY MATTER CALLING FOR THE EXERCISE OF JUDGMENT UNDER THE STATUTES DEFINING "PERIODICAL PUBLICATIONS."

No facts relating to the definition of "periodical publications," as given by the Statute, are in dispute.

It is admitted in regard to these publications that —

(1) They are regularly issued quarterly, bear date of issue, and are numbered consecutively;

(2) from a known office of publication;

(3) are formed of printed paper sheets without board, cloth, leather, or other substantial binding, such as distinguish books for preservation from periodical publications;

(4) are devoted to literature, have a legitimate list of subscribers, and are not designed primarily for advertising purposes, or for free circulation, or at nominal rates;

(5) that their character has remained unchanged from time of first admission to filing of the Bill.

Since the final hearing on the Bill a claim has been made that they are not "devoted to literature" because they are literature.

The allegation of the Bill that they are devoted to literature is not denied by the Answer, and no intimation was ever made that such a distinction was claimed to exist until the argument upon appeal from the decision of Justice Hagner.

It is submitted that it cannot be said with any fair use of language that publications which embrace the collection and publication, with editorial note and comment, of the best examples of literature, are not devoted to literature.

Indeed, the point would seem almost too trivial for serious comment, had it not been given weight in the opinion of the Court of Appeals.

No fact necessary to be determined by the Postmaster-General is undetermined and there is nothing upon which judgment or discretion, so far as it has been granted to the Postmaster-General, remains to be exercised.

The determination of the Postmaster-General that these admitted facts do authorize their exclusion is a mistake of law.

"CHARACTERISTICS OF BOOKS."

Every publication consisting of printed leaves bound together is a book.

The judgment of the Court of Appeals appears to rest altogether on the view that the publications called the "Riverside Literature Series"

are "books," and for that reason alone are not within the class which, under the Acts of Congress, is entitled to be carried in the mails as second-class matter. Referring to those publications, the opinion inquires (Record, p. 30),—

"do they constitute a periodical publication, and become mailable "matter of the second class as defined in sections 10 and 14? We "think that there is but one reasonable answer to this question and "that has been given by the Postmaster-General. Henry Esmond, "when given to the world by the genius of Thackeray, in 1852, and "whether issued by the publishers in paper covers, or with board, "cloth, leather, or other substantial binding, was a book. Republished "singly, at any time, since the enactment of the present postal law, "and mailed, either bound or unbound, it has been, and is now, un-"questionably subject to postage as matter of the third class. Does "it become any the less a book when, there being no protecting "copyright, it may be republished verbatim, under its original title, "with the addition of a number of a named series, consisting of books "by other authors numbered consecutively, and issued at stated pe-"riods, not less than four times a year? Can the well-known book "lose its identity and become completely merged in a periodical "publication through the adoption and imprint of these additions? "Surely Congress could have contemplated no such possibility when "it undertook the complete classification of mail matter, putting books "in one class, and periodical publications in another."

This view adopts in express terms the ground taken by the Postmaster-General, in the notice of April 4, 1902, given to the appellants, through the Postmaster at Boston (Record, p. 3), that these publications would be denied second-class rates of postage "*on the ground that your publication has the characteristics of books.*"

An intelligent regard to the language employed in the Statutes, as well as to the manifest purpose which controlled Congress in this legislation, show very clearly that Congress has not, by expression or reasonable implication, denied to "books," or to publications having "the characteristics of books," the privileges of mailable matter of the second class.

The Statute itself is its safest and best interpreter. Where the meaning of its language is clear and unambiguous no rules of construction need be applied, the words speak for themselves. Where the legislative intent is manifest, the Act must be interpreted according to that intent. All technical rules of construction, or force of particular terms, must yield to the clear expression of the will of the legislature. If any words in the statute are doubtful or obscure they must be inter-

preted in the light of the manifest intention of the legislature. Where the meaning of the statute is doubtful, the reason and purpose of it should be considered.

Statutes should be so construed, if practicable, that one section will not defeat or destroy another, but explain and support it. They should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or an absurd conclusion.

What was the intent and purpose of Congress as manifested by the Act of March 3, 1879, and its subsequent amendments (1 Suppl't R. S. 454, and 2 Suppl't R. S. pp. 196, 1444)?

Prior to the Act of March 3, 1879, the legislation of Congress as to mail matter was as follows: —

Statute 1845, ch. 43, sec. 16, defines mailable matter to mean —

"all letters and newspapers and all magazines and pamphlets periodically published, or which may be published in regular series, or in successive numbers, under the same title, though at irregular intervals, and all other written or printed matter whereof each copy or number shall not exceed eight ounces in weight, except bank-notes, without written letters accompanying them; but bound books of any size shall not be held to be included within the meaning of these terms."

Statute 1852, sec. 2, —

"Books bound or unbound, not weighing over four pounds, shall be deemed mailable matter."

Statute 1863, ch. 71, divided mailable matter into three classes: —

First. Letters.

Second. Regular printed matter.

Third. Miscellaneous matter.

Sec. 20 provided, —

"that the first class embraces all correspondence wholly or partly in writing except that mentioned in the third class. The second class embraces all mailable matter exclusively in print and regularly issued at stated periods without addition by writing, mark, or sign. The third class embraces all other matter which is or may be hereafter by law declared mailable; embracing all pamphlets, occasional publications, books, book manuscripts, and proof-sheets."

Statute 1872, ch. 335, contains an extended revision of the Statutes relating to the Postal Service, which was substantially reënacted in the Revised Statutes, sections 3875 *et seq.*

By Revised Statutes, sec. 3877 (Stat. 1872, ch. 335, sec. 132, re-enacted without change), it was provided that —

"mailable matter of the second class shall embrace all matter "exclusively in print and regularly issued at stated periods, from a "known office of publication, without addition by writing, mark, or "sign."

Here no reference is made to the subject-matter of the publication. All matter not actually prohibited as injurious to morals or injurious to society was admitted, if the conditions prescribed were complied with.

By the Act of March 3, 1879, a new and distinct purpose and object become manifest, the character and tendency of the subject-matter of the publication become an essential condition to its admission as second-class matter. The Act provides substantially as follows: —

SEC. 10. That mailable matter of the second class shall embrace all newspapers and other periodical publications which are issued at stated intervals, and as frequently as four times a year, and are within the conditions named in sections 12 and 14.

SEC. 12 provides for the examination of matter of the second class at the office of mailing.

SEC. 14. That the conditions upon which a publication shall be admitted to the second class are as follows, viz.: —

First. It must be regularly issued at stated intervals, as frequently as four times a year, and bear a date of issue, and be numbered consecutively.

Second. It must be issued from a known office of publication.

Third. It must be formed of printed paper sheets, without board, cloth, leather, or other substantial binding, such as distinguish *printed books for preservation from periodical publications.*

Fourth. It must be originated and published for the dissemination of information of a public character or devoted to literature, the sciences, arts, or some special industry, and having a legitimate list of subscribers.

Of these conditions, performance, by these appellants, of the First, Second, and part of the Fourth, is not questioned, but as to the Third and part of the Fourth, it is contended that the "Riverside Literature Series," published by appellants, from an actual inspection of specimens produced in court, does not come within the beneficent protection of the Third condition because they are "books," and are under grave suspicion of ineligibility under the Fourth condition, because they are not "devoted to literature," but are literature themselves, the latter already having been referred to in this brief. It cannot escape notice that the Third condition does not prescribe features by which books, or even printed books, may be distinguished from periodical publications, but the

discriminating language is "such as distinguish printed books *for pre-* "*servation* from periodical publications."

In the opinion of the Court of Appeals (Record, p. 31), this language of the Statute is disposed of as follows: —

> "It is to be observed, also, that the provisions of section 14 are not "descriptive of the periodical publications named in section 10, but "express limitations upon the admission of such publications to car- "riage as second-class matter, under the head of conditions to which "they must conform before the privilege can be enjoyed. One does "not look to them to determine what is a periodical publication, but "to ascertain whether, being such a publication as is embraced by "section 10, it also answers the conditions imposed. Viewed in this "light there is no substantial weight in the argument based on the "concluding words of the third condition, that relates to binding, "namely, 'such as distinguish printed books for preservation from "'periodical publications.' These words are to some extent confusing, "but it would do violence to approved rules of construction to give "them the effect of controlling the meaning of periodical publications. "The words are apparently superfluous, and if used with any purpose "it would seem to be rather to emphasize the limitation of unbound "periodicals."

Of course, if words and even entire clauses are to be wrested from the body of the text of a statute, no weight can be given to an argument based upon the words so eliminated, but we are aware of no rules of construction, approved or otherwise, which warrant such liberties with a statute. The words of the Statute which are so rudely discarded as "superfluous" seem rather to have been employed with intelligent discrimination, and to have an important function assigned to them of excluding the very conclusion which the learned Court of Appeals has been enabled to reach only by this drastic Cæsarian operation.

We do not know where the rules of construction which warrant this method of construction are to be found, or by whom these rules have been "approved," but we do find that this Court has recognized and enounced rules of quite different import.

In Platt *vs.* Union Pacific R. R. Co., 99 U. S. 58, this Court said: —

> "But the admitted rules of statutory construction declare that a "legislature is presumed to have used no superfluous words. Courts "are to accord a meaning, if possible, to every word in a statute. In "Commonwealth *vs.* Alger, 7 Cushing, 53–89, it was said that in put- "ting a construction upon any statute every part must be regarded, "and it must be so expounded, if practicable, as to give some effect "to every part of it. So in People *vs.* Burns, 5 Mich. 114, it was held

"that some meaning, if possible, must be given to every word in a "statute, and that where a given construction would make a word "redundant it was reason for rejecting it."

The Statute defines second-class matter only by a category of the features which distinguish it. Section 10 provides that "mailable matter "of the second class shall embrace all newspapers and other periodical "publications which," etc. Section 14 recites the conditions on which a publication shall be admitted to the second class. That is, that while newspapers and periodical publications are embraced in the second class, yet these will be admitted only on compliance with the conditions prescribed in section 14.

We are concerned here with the inquiry — not what is a periodical publication, or what is a book, but What is the publication for which provision is made by sections 10 and 14 of this Act? Certain badges or earmarks are given by which it may be distinguished, and the Statute describes these generally, as features which "distinguish printed books for preservation from periodical publications." A distinction is plainly recognized here between two classes of books, namely, books for preservation and books not for preservation. The first class is excluded from the second-class mail matter. The second class *is included within it.* So it would seem that because a publication is a *book* is not, of itself, enough to exclude it from the second-class mail matter. It must be a "*book for preservation.*" Reference is here had to our common experience. We understand and recognize as books for preservation those books the paper and binding of which is adapted to preserve them on the shelves of our libraries. They are not what are known as "stage-coach" editions, with which we beguile the tedious hours of a journey, and then give or cast them away. The subject-matter of the book has nothing to do with its classification as a book for preservation, or not for preservation. The gravest treatises on historical, philosophical, and scientific subjects have been published in the form of books *not for preservation.* The Reports of the decisions of the Supreme Court of the United States are published semi-monthly on flimsy paper, in paper binding. On each copy is printed the words, "For temporary use, not to be bound." The same Reports are printed from the same forms, on heavy paper, and bound in calf or sheep. The former are books not for preservation, while the latter are exactly the same books, but for preservation.

It would seem to be too plain for argument, then, that the words employed in the Statute, "such as distinguish printed books for preservation from periodical publications," are neither confusing nor superflu-

ous, but that they are necessary to a clear apprehension of the intention of Congress and of the means provided for effectuating that intention.

The Court of Appeals in its opinion (Record, p. 30) refers to "Henry Esmond" and Plutarch's "Life of Alexander," and asks if these classic stories can be degraded and transformed into mere periodical publications by being bound in paper covers, issued at stated intervals, bearing a date of issue, and numbered consecutively.

We answer that they can, and that this was the controlling beneficent purpose and intent of Congress in the Act of March 3, 1879, and experience has abundantly vindicated the wise charity of the Act. Millions of cheap publications, such as those issued from the Riverside Press, of the soundest and purest literature of our English tongue, have by this means been sown broadcast over the land, and brought within the reach of the poorest and humblest of our people. The civilizing influences thus exerted have been of incalculable value in the diffusion of knowledge, the elevation of morals, the refinement of sentiment and thought and the formation of good and noble characters, and these were the ends which Congress had in view in facilitating the distribution of such publications by placing them in the mails as second-class matter to be carried at the rate of one cent per pound. If Congress contemplated, as we suppose it did, in reducing the rate of postage on this class of publications, a measure of educational benefit resulting therefrom, it must be presumed to have intended that such benefit should be as extensive as the means employed would allow, and that literature, art and science, and special industry, applied as well as theoretical, should be given to the people.

This broad and beneficent purpose of Congress, expressed in the Act of March 3, 1879, is confirmed and accentuated by the Act of July 16, 1894 (28 Stat. 104, 2 Suppl't R. S. 196), in which it is provided, —

"That from and after the passage of this Act, all periodical publi-
"cations issued from a known place of publication, at stated intervals,
"and as frequently as four times a year, by or under the auspices of
"a benevolent or fraternal society or order, organized under the lodge
"system, and having a bona fide membership of not less than one
"thousand persons, or by a regularly incorporated institute of learn-
"ing, or by or under the auspices of a trades-union, and all publica-
"tions of strictly professional, literary, historical, or scientific soci-
"eties, including the bulletins issued by the State boards of health,
"shall be admitted to the mails as second-class matter, and the post-
"age thereon shall be the same as on other second-class matter, and
"no more," with the proviso "that they shall be formed of printed
"paper sheets without board, cloth, leather, or other substantial bind-

"ing such as distinguish printed books for preservation from periodical "publications."

All "periodical publications" must have some characteristics of books in the nature of things. A book is merely a collection of written or printed sheets fastened or bound together.

It is only when a periodical publication, which conforms with all other requirements of the statute, is bound in board, cloth, leather, or other substantial binding, such as distinguishes printed books for preservation from periodical publications, that it has a characteristic of books which prohibits its admission as mailable matter of the second class.

PERIODICAL PUBLICATIONS.

It is now claimed that the term "periodical publication" is the equivalent of the word "periodical," and that the word "periodical" is restricted to a definite type or class of publications, the mean or common term of which is "magazines."

If this claim is correct it follows, that, notwithstanding the division of mailable matter as particularly specified by

SEC. 7. *First:* Written matter.
Second: *Periodical publications.*
Third: Miscellaneous printed matter;

and notwithstanding the statement in

SEC. 10. Mailable matter of the second class shall embrace all newspapers and other *periodical publications* which are issued at stated intervals, as frequently as four times a year, and are within the conditions named in sections 12 and 14;

and notwithstanding the statement in section 14 of the conditions upon which *a publication* shall be admitted to the second class;

and notwithstanding the distinction in the same section which distinguishes printed books for preservation from *periodical publications;*

and notwithstanding the proviso that nothing shall be construed to admit to the second class *regular publications* designed primarily for advertising, etc.;

it must be held that the definition of the subject named, viz., periodical publications, is not a definition of that subject, but of another and more restricted subject.

Mr. Justice Shepard in the opinion of the Court of Appeals (Record, p. 30) states as "matter of common knowledge when this statute of 1879 was enacted" certain facts in regard to some periodical publica-

tions known as magazines and reviews which he declares must be held to have been in the minds of Congress, as restricting the meaning of the term, and wholly omits to state other matters of equally common knowledge, — that periodical publications containing but one complete work in each issue had long been published and carried in the mails as periodicals, and that their periodical character had never been questioned so long as they were issued periodically; that when in 1877 Donnelly, Lloyd & Co., of Chicago, published a book entitled "Daniel Deronda" in a periodical publication entitled "The Lakeside Library," and the postmaster of Chicago questioned its right to be mailed at pound rates, Attorney-General Devens decided that it was a "periodical publication," and should be admitted as such if it complied with the law respecting "periodical publications."

15 Op. of Atty.-Gen. 346.

The argument of the Court of Appeals (Record, p. 31), that unless "periodical publications" is held to have this restricted signification it would result in the admission of foreign novels free, has no weight in view of the provisions of the Tariff Acts (see Acts of 1890, ch. 1244, par. 657 and 1894, ch. 349, par. 562) referring to the admission of newspapers and periodicals, "but the term 'periodical,' as herein used, "shall be understood to embrace only unbound or paper-covered publi- "cations containing current literature of the day and issued regularly "at stated periods as weekly, monthly, or quarterly."

Indeed the restricted magazine construction is entirely exploded by the opinion of the Court of Appeals in the case of Payne *vs.* Nat. Rwy. Pub. Co., 20 App. D. C. 581, for the Nat. Rwy. Guide, there held to be a periodical publication within the definition of the Statute, has none of the characteristics specially distinctive of magazines or reviews.

A LONG ESTABLISHED, UNIFORM CONSTRUCTION BY AN EXECUTIVE DEPARTMENT SHOULD NOT BE DISREGARDED WHERE PERSONS HAVE MADE CONTRACTS AND INCURRED LIABILITIES UPON THE FAITH OF SUCH CONSTRUCTION.

Where the language of an Act of Congress is so clear and explicit as not to be open to construction, its construction cannot be changed by the practice of the Department, however long continued; but if there is ambiguity or doubt as to the meaning of the Act, then such a practice, begun early and continued long, would be in the highest degree persuasive, if not absolutely controlling, in its effect: —

United States *vs.* Graham, 110 U. S. 219.
United States *vs.* Hill, 120 U. S. 169.
United States *vs.* Finnell, 185 U. S. 236, 244.

From the 17th of March, 1886, to 5th of May, 1902, a period of sixteen years, the appellants have sent these publications through the mails, after first obtaining a certificate from the Post-Office Department that it had been "determined by the Third Assistant Postmaster-"General to be a publication entitled to admission into the mails at "the pound rate of postage, and entry of it as such is accordingly made "upon the books of this office."

On the faith of this determination they had made contracts with their subscribers throughout the United States, on terms which were calculated and fixed on the "pound rate of postage." They had, during this period, largely increased the volume of their publications; had extended the field of their operations and multiplied their contracts, and to that extent had greatly enlarged their obligations. These are yet in binding force and operation, and must be met and fulfilled by them. The question is thus presented here: Has the present Postmaster-General the lawful power and right, by a different and novel construction of the Act, to deprive complainants of the right, so acquired, and entail upon them the vast pecuniary loss which must be consequent upon this capricious change of the law.

In United States *vs.* Alabama R. R. Co., 142 U. S. 621, the Supreme Court said: —

"We think the contemporaneous construction thus given by the "Executive Department of the Government, and continued for nine "years, through six different administrations of that Department — "a construction which though inconsistent with the literalism of the "Act, certainly consorts with the equities of the case — should be de-"cisive in this suit. It is a settled doctrine of this Court that in case "of ambiguity, the Judicial Department will lean in favor of a con-"struction given to a statute by the Department charged with the "execution of such statute, and if such construction be acted upon "for a number of years will look with disfavor upon any sudden "change, whereby parties who have contracted with the Government "upon the faith of such construction, may be prejudiced."

If the Court may take notice of the employment of capital in business without interference of the National Government, under its implied sanction it will certainly look with disfavor upon a change in the construction made by the officers charged with that duty and upon the express sanction of which third parties have acted and incurred large pecuniary liabilities.

Del Monte *vs.* Last Chance, 171 U. S. 55, 62.

ON THE ADMITTED FACTS THE ACTION OF THE POSTMASTER-GENERAL IS MANIFESTLY AN ATTEMPT TO PUT INTO THE BODY OF THE STATUTE A LIMITATION WHICH CONGRESS DID NOT THINK IT NECESSARY TO PRESCRIBE.

The object of the Postmaster-General can only be accomplished by an amendment of the law.

Morrill *vs.* Jones, 106 U. S. 466.

RIGHT OF THE COURT TO INTERVENE.

Courts will not intervene in cases that are pending in a Department awaiting the exercise of its administrative functions.

Johnson *vs.* Towsley, 13 Wallace, 86.

After a matter pending in a Department has been finally disposed of the Court may be invoked to inquire whether the outcome is in accordance with the laws of the United States.

Brown *vs.* Hitchcock, 173 U. S. 473, 477.

In matters which require judgment and consideration to be exercised by an executive officer of the government, or which are dependent on his discretion the Court will not interfere to control his action.

Carrick *vs.* Lamar, 116 U. S. 423, 426.

But in this class of cases as in all others there exists in courts of equity the jurisdiction to correct mistakes, to relieve against frauds and impositions, and in cases where it is clear that those officers have, by mistake of the law, given to one man the land which on the undisputed facts belongs to another, to give appropriate relief.

Moore *vs.* Robins, 96 U. S. 530, 535.

Where the conclusions of a Department have been reached from a misconstruction, by its officers, of the law applicable to the case before it, and it has thus denied to parties rights which, upon a correct construction, would have been conceded to them, then the courts can interfere and control its determination, so as to secure the just rights of parties injuriously affected.

Sandford *vs.* Sandford, 139 U. S. 642, 647.

The facts which are here admitted of record show that the case is one which by any construction of those facts does not warrant the exclusion of these publications from the privileges of second-class matter, and the determination of the Postmaster-General that these admitted

facts do authorize their exclusion is a mistake of law and courts must have power to grant relief. Otherwise the individual is left to the absolutely uncontrolled and arbitrary action of a public and administrative officer, whose action is unauthorized by any law and is in violation of the rights of the individual.

Although the Postmaster-General had jurisdiction over the subject-matter and it was his duty to decide whether, upon the facts, these publications were entitled to admission as mailable matter of the second class, yet such a decision being a legal error does not bind the courts.

Am. Sch. of Mag. Healing *vs.* McAnnulty, 187 U. S. 94, 109.

RESULT WHICH FOLLOWS IF IT IS HELD THAT WHETHER ON THE ADMITTED FACTS THESE PUBLICATIONS DO COMPLY WITH THE CONDITIONS AND REQUISITES FOR ADMISSION AS MAILABLE MATTER OF THE SECOND CLASS IS A QUESTION WHOLLY WITHIN THE COMPETENCE AND JURISDICTION OF THE POSTMASTER-GENERAL, THE DETERMINATION OF WHICH IS WITHIN THE JUDGMENT AND DISCRETION OF THE POSTMASTER-GENERAL FOR THE TIME BEING AND IS NOT SUBJECT TO REVIEW BY THE COURT.

Assuming, for the sake of argument, that the Postmaster-General was invested by law with the discretionary power of determining whether mail matter belonged to the one class rather than to another, and that his judgment, when announced, was binding on the parties, it appears as a fact in this record that the Postmaster-General has, as to the "Riverside Literature Series," exercised that discretion and announced his judgment, and that on the faith of that judgment these appellants have contracted large obligations and incurred heavy liabilities.

On full inspection of these publications the Post-Office official, empowered to act, gave the following certificate: —

"Post-Office at Boston, Sept. 15, 1900.

"I hereby certify that the 'Riverside Literature Series,' a quarterly published at this place, has been determined by the Third Assistant Postmaster-General to be a publication entitled to admission into the mails at the pound rate of postage, and entry of it as such is accordingly made upon the books of this office. Valid while the character of the publication remains unchanged, or until revoked.

GEORGE A. HIBBARD, Postmaster,
by C. C. MANSFIELD, Asst. P. M.

Here the fact is solemnly determined, that this publication is entitled

to admission into the mails as second-class matter, and this determination is formally certified.

This certificate is declared to be valid while the character of the publication remains unchanged, or until revoked. The character of the publication remains admittedly unchanged.

For what other cause may the certificate be revoked? For fraudulent abuse of the privilege, or such other cause as would warrant the forfeiture of a legal right. The opinion of the Court of Appeals (Record, p. 33) says, —

> "In conclusion it may be remarked, that the certificate relied on is "a mere license, and by its own express declaration continues until "revoked."

Certainly, and it might have been said, "continues only until revoked."

Does the Court mean that it may be revoked arbitrarily, capriciously, and without sufficient legal cause? That it was not a revocable license was distinctly held by the same Court six months before, in the Railway Publication case, in which that Court said: —

> "The citizen who desires to have his publication carried in the mails "of the United States, as second-class matter, and who has fully and "fairly complied with all the requirements of the Statute in regard "thereto, has acquired a positive legal right to have it so carried, and "his right will be enforced by the writ of mandamus."

One having a "positive legal right" cannot be deprived of it by a mere arbitrary revocation, and a "mere licensee" cannot resist revocation of his mere license by the writ of mandamus.

The words "until revoked" must be taken to mean revoked for legal cause.

On April 14, 1902, appellants were called (Record, page 3) "to show "cause why" their publication should not be denied second-class rates of postage "on the ground that your publication has the characteristics "of books."

But these publications had the same characteristics of books on Sept. 15, 1900, when adjudged to be entitled to admission into the mails, as second-class matter, which they had on May 5, 1902, when adjudged, upon the foregoing order to show cause, not entitled to such admission.

Both decisions were made upon the same state of facts.

If it was an act involving the exercise of judgment and discretion, to the extent that there is no power to control such discretion, however erroneous its exercise may seem to have been, then it was a judicial act.

Noble *vs.* Union River L. R. R., 147 U. S. 165, 170.

If the Postmaster-General had confided to him by law authority to be

exercised by him in his discretion, upon an examination of facts, of which he is made the judge, his decision upon these facts is absolutely conclusive as to their existence, and cannot be reversed by his successor or questioned by the courts.

United States *vs.* Wright, 11 Wallace, 648.

If the Postmaster-General acted in a judicial rather than a ministerial capacity in determining on May 5, 1902, that these publications did not fall within second-class matter, entitled to pound rate privileges, then he must have acted in a like capacity on Sept. 15, 1900, when he decided that they were in the second-class privileges, and it is not competent for him, any more than it would be for a court, to reverse and annul his previous final judgment on the same state of facts, it being one of the admitted facts that the character of the publication has remained unchanged.

If he is *judicial* for one purpose he is judicial for *all* in the same matter.

HOLMES CONRAD,
WILLIAM S. HALL.

APPELLANT'S

BRIEF

28123

Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 373.

BATES AND GUILD COMPANY, *Appellant*,

vs.

HENRY C. PAYNE, *Postmaster-General, Appellee.*

BRIEF FOR APPELLANT.

STATEMENT OF THE CASE.

THE question involved is whether certain "periodical publications" published by the appellant, and called "Masters in Music," are entitled to be carried in the mails as mailable matter of the second class.

The case was heard on Bill and Answer, in the Supreme Court of the District of Columbia, and on the inspection by the Court of certain of these publications of the appellant, which, by stipulation (Record, page 13), were admitted for inspection. On March 10, 1903, a final decree was made by that Court, by which it was adjudged that the complainant, who is appellant here, was entitled to have its said publications received and carried through the mails as "mailable matter of the second class."

On appeal to the Court of Appeals of the District of Columbia, that Court, on June 5, 1903, reversed the decree of the lower court, and remanded the cause, with directions to dismiss the Bill. The case is here on appeal from that decree.

BRIEF OF THE ARGUMENT.

This case was heard in both the lower courts, and will be heard in this Court, with the case of Houghton, Mifflin & Co. *vs.* Henry C. Payne, Postmaster-General, which involves the same questions of law,

and for that reason we adopt here the brief filed for the appellants in that case. The Bill in this case, as in that, charges full compliance by the complainant with all the requirements of the Statute as to second-class mail matter, and these charges are not denied in the Answer of the defendant.

The first of the publications of the "Masters in Music" was issued in January, 1903, and in that month application was duly made for the entry and admission of the publications, as mailable matter of the second class, at the Post-Office in the city of Boston, Mass., and was approved by the Postmaster at that office. On the 20th January, 1903, this appellant was notified by a letter dated the 17th January, 1903, from the Third Assistant Postmaster-General, addressed to the Postmaster at Boston, —

> "that admission to the second class of mail matter of the publica-
> "tion known as 'Masters in Music,' published in your city by Bates
> "and Guild Company, is denied, for the reason that the publication
> "has, under the Statute, the characteristics of third-class matter, and
> "not second-class matter (Act of March 3, 1879). It is composed
> "mainly of sheet-music. You will inform the publisher of this denial
> "of entry."

That this appellant was then liable, under existing contracts, to supply upwards of eighty thousand copies of these publications, at a price based upon the postage rates charged upon them as mailable matter of the second class.

This fact was charged in the Bill, and was not denied in the Answer of the defendant.

The Answer of the defendant, while not denying any of the allegations of fact made in the Bill, sets up, affirmatively, as grounds of defense, the following: —

(1) That in form, the publication has the characteristics of third-class matter, "in that it is a book." That in matter it "has not the char-
"acteristics of currency or miscellany common to newspapers and
"other periodical publications, that it relates to a single subject, and
"to a single individual" only introductory to its main contents, viz., sheet-music.

(2) That it is not a "periodical publication," because each publication is complete in itself, without relation or connection with those that precede or follow it.

(3) That it is not devoted to the "arts," within the meaning of the Act of March 3, 1879, for the reason that it is not a continuing permanent "periodical publication" within the accepted and statutory meaning of that term, the contents of which are devoted to the

arts and have the characteristics of miscellany and currency such as denote periodical publications and magazines in general, but that, save in the sense that the subject-matter of such publication is the art of music, wherein it differs in no sense or particular from any other collection of sheet-music, or of any other book relating to music, the said collection does not comply with the statutory requirements of sections 10 and 14 of the Act of March 3, 1879.

(4) That the Postmaster-General, "after an inquiry into the facts relevant and material to the inquiry, an examination of evidence, and a construction of law and application thereof to the facts, found and determined that the publications offered for transmission, not having the characteristics of second-class matter, were not entitled to admission to the mails at the second-class rates, and the application for that rate of postage was therefore denied, which said finding, determination, and decision involved the exercise of judgment and discretion on the part of this defendant, and for that reason is not subject to be reviewed by the courts."

The question which this Bill is brought to test is contained in the ruling of the Post-Office Department, "it is composed mainly of sheet-music" and for that reason "has under the Statute the characteristics of third-class matter and not second-class matter." (Record, p. 7.)

This is the only ruling which the Department has ever made in regard to these publications.

It never has been, and cannot be, truthfully denied that these publications are published as frequently as four times a year, bear date of issue, are numbered consecutively, and are issued from a known office of publication, and are formed of printed sheets without board, cloth, leather, or other substantial binding such as distinguish books for preservation from periodical publications, and that they are devoted to the art and science of music.

These facts the Post-Office Department never questioned, resting its decision on the ruling as given, "it is composed mainly of sheet-music."

The Answer seeks to avoid the decision of this question and to have the Bill dismissed on the highly technical allegation, —

"inasmuch as but one publication known to the defendant has been published under the name of 'Masters in Music,' the defendant is unable to admit that the said publications are published as frequently as four times a year, or bear date of issue, or are numbered consecutively, or are issued from the known office of publication of the complainant, or that said publications or each and every of them are formed of printed paper sheets without board, cloth,

"leather, or other substantial binding such as distinguish printed "books for preservation from periodical publications, or that said "publications or each or every of them are devoted to the art and "science of music." (Record, p. 6.)

To this technicality, which was never raised by the Department, the technical reply is made that as the case is heard on Bill and Answer, facts well alleged in the Bill and not denied or put in issue by the Answer shall be deemed to be admitted.

That all these facts are well alleged in the Bill and are not denied or put in issue by the Answer, that the allegation, "inasmuch, etc.," is at most a statement of a conclusion of law and is not an allegation denying or putting in issue the facts referred to which are well alleged in the Bill.

These questions of fact were never raised by the Post-Office Department, and it is confidently submitted that they are not raised by this Bill and Answer.

The questions presented in the several grounds of affirmative defense, as to the "Discretion of the Postmaster-General," "The Characteristics of Books," "Periodical Publications," and the "Rights of the Courts to Intervene," have been sufficiently discussed in the brief filed in the Houghton case, and need not be repeated here.

One principal feature distinguishes this case from the Houghton case. In the Houghton case, the publications had been formally declared by the Postmaster-General to be entitled to admission and carriage in the mails, as mail matter of the second class, and had been so carried for sixteen years before their classification was questioned and denied, while in this case, the publication entitled "Masters in Music," although approved by the Postmaster at Boston, and received by him as mail matter of the second class, was subsequently denied admission by the Postmaster-General, on the ground that "it has the characteristics of third-class matter and not second-class matter," within a few weeks after the first number had been received at the Boston post-office. This may be accepted as a denial, *in limine*, of its admissibility as second-class matter.

But it is obvious that this difference in the facts of the two cases can have no weight in the determination of the main question presented here for decision, for if this appellant has, as to its publications, complied with all the requirements of the Statute, entitling them to admission and carriage in the mails, as mail matter of the second class, their denial of such admission and carriage by the Postmaster-General

was as flagrant a violation of its legal rights, as was the exclusion of the publications of Houghton, Mifflin & Co., which had been admitted and carried for sixteen years.

The single question, then, to be determined, is, Does the publication, entitled "Masters in Music," upon the undisputed facts, fully and in all respects comply with the requirements of the Statute as to mail matter of the second class? The Bill of complainant charges that it does. It recites (Record, p. 2) all of those requirements, and charges specifically that "your Orator, in the publication and issue of these publications "has complied with all the terms, conditions, and requirements of the "laws of the United States relating to mailable matter of the second "class."

This specific charge of the Bill is not denied by the defendant in his Answer thereto, but indeed is practically admitted. The defendant being content to rest his defense on the general ground that "the pub- "lication has the characteristics of third-class matter, and not the charac- "teristics of second-class matter." Just as in the Houghton case, he rests his defense on the like general ground, that that publication has the characteristics of books.

The Statute, it will be observed, says nothing of "characteristics," either of books or second-class matter, or third-class matter, but it prescribes, with singular minuteness of detail, certain objective and subjective features which must concur in publications to entitle them to admission and carriage in the mails as matter of the second class.

The objective, or physical features are, that the publication must appear (1) to be issued regularly at stated intervals, as frequently as four times a year, and bear a date of issue, and be numbered consecutively. (2) It must be issued from a known office of publication. (3) It must be formed of printed sheets, without board, cloth, leather, or other substantial binding, such as distinguish printed books from periodical publications.

The subjective features are, that the publication must be originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry, and having a legitimate list of subscribers.

The Proviso is, that the foregoing shall not be construed so as to admit to the second-class rate regular publications designed primarily for advertising purposes or for free circulation, or for circulation at nominal rates.

Now it is apparent that the objective or physical features can be ascertained only by ocular demonstration, and this evokes "the exercise of judgment and discretion" only as that faculty is exercised in observing the tube of a thermometer or a barometer to ascertain the point at

which the mercury stands. The judicial officer who should "find, hold, and determine" that the mercury stood at 90°, when to the eyes of all observers it stood, in fact, at 40°, would insist in vain that his decision "is not subject to be reviewed by this honorable Court."

The subjective features call for the exercise of but little more of judicial and discretionary faculties. Whether a publication is designed and adapted "for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry," may be ascertained by a very casual glance at the contents.

The particular publication involved in this case — "Masters in Music" — is said, in the Answer of the defendant here (Record, p. 8), to be "designed to follow one another monthly, in such manner as to form a wholly disconnected and varied succession of distinct collections of sheet-music, prefaced by explanatory, biographical, critical, and bibliographical comment." Accepting this unfriendly description of the publication as a reasonably true description, we risk nothing in submitting the publication as one "devoted to literature, science, and art."

A periodical publication devoted to the art, science, and literature of Music, can hardly be expected to do more, for popular education at least, than present the great Masters in Music, either chronologically, or by their different schools, by giving specimens of their creations in "sheet-music," with explanatory, biographical, critical, and bibliographical comment.

Upon the facts, which are not denied, here is a periodical publication which contains, as inspection discloses, first, a biographical sketch of a certain composer of sufficient distinction to be designated a master or classic; second, a description of his art; third, notes explanatory and descriptive of selections from his works; fourth, selections of music from his works.

The separate pieces of music are selected in illustration of the text and notes, are only fragments or portions of the particular works of the composer from which they are selected, and derive their value as such illustrations in the connection in which they are printed, and not as independent pieces of sheet-music.

Each monthly issue is one of a series, each one to be devoted to a single composer, with a subscription covering a year's issue. Not only is each monthly publication a part of a continuous series, but each page is numbered continuously for index and reference.

In fact, it is difficult to see in what respects a publication of this character devoted to the Art of Music could be made to comply more completely and accurately with the letter and spirit of the Statute.

But, by stipulation of the parties, specimens of the publication have been, and will again be presented to the Court, who can then see how

far they come fairly and reasonably within the spirit, as well as the letter, of the law.

With great deference to the Court of Appeals, whose judgment we are here asking to have reviewed, as well as to our learned opponents of the Bar, we venture to submit that the erroneous view they have taken of this Act of Congress results from their failure to apply the true touchstone to discover its real significance, purpose, and intent. It was not, as they appear to think, an economic measure, to curtail and restrict the mail matter of the second class with a view to larger postal receipts, and a retrenchment of postal expenditures, but, on the contrary, it was intended to introduce an element hitherto unknown in postal legislation, to wit, the employment of the postal facilities as a means of the diffusion of useful knowledge, and of contributing to the growth of popular education. This would seem to be evident from the very objects specified in the terms of the Act. What has the postal economy of the Government to do with the dissemination of information of a public character, or with devotion to literature, science, art, or special industries? What connection can be supposed to exist between them? Why should Congress require that periodical publications devoted to these objects be carried in the mails at the rate of one cent per pound, while other publications devoted to other objects are required to pay eight cents per pound?

But the public records of recent Congressional proceedings cast a light on the subject which makes it well-nigh impossible to err in our judgment as to the purpose and intention of Congress.

February 2, 1888, a bill was before Congress to restrict the publications of this class, but failed to become a law. April 24, 1894, another amendment for this purpose was debated and rejected in the House of Representatives, and in January, 1897, the Loud Bill, so called, after debate, failed to become a law.

The policy of the Act of March 3, 1879, was adhered to, and on July 16, 1894 (28 St. 104), Congress greatly enlarged the class of publications to which the privileges of second-class mail matter was allowed.

The express refusal of Congress to adopt and enact as a law the provisions of these various bills was in effect a declaration by Congress of the purpose, meaning, and intent of the Act of March 3, 1879, which they sought to amend.

In Cope *vs.* Cope, 137 U. S. 682, 688, this Court said: "The several acts of Congress, dealing, as they do, with the same subject-matter, should

be construed, not only as expressing the intention of Congress at the dates the several acts were passed, but the later acts should also be regarded as legislative interpretations of the prior ones. United States *vs.* Freeman, 3 Howard, 564, Stockdale *vs.* Insurance Co., 20 Wall. 323."

HOLMES CONRAD,
WILLIAM S. HALL.